No. 13115

United States
COURT OF APPEALS
for the Ninth Circuit

R. M. PERRIN and MARY PERRIN,
Appellants,

v.

ALUMINUM COMPANY OF AMERICA and C. S. THAYER,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the Western District of Washington, Southern Division.

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CASES CITED

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JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon 28 U.S.C.A., Section 1441, which provides for the removal of actions in cases of diversity of citizenship where none of the parties in interest, properly joined,

is a citizen of the state in which the action is brought. There was complete diversity of citizenship between appellants and Aluminum Company of America (R. 9, 26). Appellees' petition for removal (R. 8), the affidavit of C. S. Thayer (R. 13) and the affidavit of Roy A. Hunt (R. 25) showed, and the court determined, that appellee C. S. Thayer, a resident of Washington, was fraudulently and improperly joined as a defendant and that the case was thus removable (R. 19, 27).

When supplemented by the foregoing statement, appellants' Jurisdictional Statement (Br. 1-2) adequately sets forth the basis for the jurisdiction of the district court and of this Court.

STATEMENT OF THE CASE[1]

This is the appellants' second appeal to this Court. The district court dismissed this action on December 8, 1950, because it appeared from the pleadings that the action was barred by the statute of limitations (R. 29). Appellants attempted to appeal from this judgment but their appeal was dismissed by this Court because appellants had not filed their notice of appeal within the time required by law (R. 48). The district court entered judgment pursuant to the mandate of this Court on June 8, 1951, affirming in all respects its judgment of December 8, 1950 (R. 48). Appellants approved the

[1]Appellants' brief contains a number of erroneous statements of fact and statements which are not supported by the record. These errors and unsupported statements are listed in the Appendix to this brief.

form of the judgment on mandate, did not object to its entry and did not appeal from it (R. 51).

On July 17, 1951, approximately six weeks after the entry of judgment on the mandate of this Court, appellants filed a motion: (1) to vacate the judgment on mandate; (2) to vacate the judgment entered on December 8, 1950; (3) to vacate the order of September 18, 1950, denying appellants' motion to remand; and (4) for an order remanding the case to the state court (R. 52). The motion did not state the grounds therefor as required by Rule 7(b)(1).[2] Appellants made no showing to justify the relief they sought; they relied only on the records and files in the case. On August 3, 1951, the Court, after oral argument, entered an order denying appellants' motion (R. 53). Appellants now appeal from that order.

There is nothing in the record to indicate on what, if any, basis appellants urged below that the judgments herein should be vacated. On this appeal they contend that the judgments should have been set aside in order that the Court might re-examine the question of fact upon which it had passed when it denied their motion to remand the case to the state court. But appellants have not shown, nor do they assert, that there has been any mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud such as might justify the vacation of a judgment under Rule 60(b)[3] in order that an issue of fact may be re-examined.

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[2]Federal Rules of Civil Procedure.

[3]*Ibid.*

Quite obviously appellants sought by their motion, and seek by this appeal, a review of the judgment dismissing this action on the very grounds asserted in their former appeal, *i.e.,* that the case should have been remanded to the state court and that the action was not barred by the statute of limitations (R. 32). They rely on Rule 60(b) to grant them a second chance to argue these questions in the district court and to appeal to this Court. The only circumstance suggested for this unusual and extraordinary relief is the dismissal of their untimely direct appeal from the original judgment (Br. 25). But Rule 60(b) clearly is not intended to afford a device by which an appeal may be had from a judgment other than as provided in the statutes and rules relating to appeals. The time for appeal from the lower court's judgment long since having expired, there is no present basis for a review by this Court of the issues therein adjudicated.

QUESTION PRESENTED

The precise issue before the Court is whether the trial court abused its discretion by refusing to vacate the judgment which it entered pursuant to the mandate of this Court and the judgment from which appellants' first appeal was taken. The determination of this issue depends upon whether the reasons advanced by appellants for the relief provided by Rule 60(b) are so compelling as to preclude any exercise of discretion by the lower court.

This issue is beclouded by arguments, contentions and suggestions contained in appellants' brief which clearly do not bear on the single issue to be decided by this Court. Preliminary consideration and elimination of these contentions, suggestions and arguments will clarify the real issue.

Refusal of the Court to Remand

Obviously, there can be no abuse of discretion where the Court refuses to do that which it is without power to do. Criticism of the Court's refusal to vacate its original order denying appellants' motion to remand the case to the state court and its refusal now to enter an order so remanding the case, as requested by appellants' motion,[4] creates no real issue here. This is so because the Court lacked power to re-examine the fact issue which it had previously determined adversely to appellants, or to remand the case once final judgment had been entered.[5] 28 U.S.C.A., Section 1447(c), provides:

> "If at any time *before final judgment* it appears that the case was removed improvidently and with-

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[4]After filing their original motion to remand, *appellants* moved the court for an order restraining and enjoining appellants, their agents and attorneys, from further prosecuting this action in the state court (R. 27-28). The court granted appellants' motion (R. 27-28). Appellants have never asked that this order of the court be vacated.

[5]The previous determination of the court with respect to the jurisdictional issue was clearly correct. Cases which required the court to determine the issue raised by Aluminum Company of America's charge of fraudulent joinder adversely to appellants are *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 27 Sup. Ct. 184; *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 42 Sup. Ct. 35.

out jurisdiction, the district court shall remand the case * * * ." (Italics supplied.)

Once appellants' former appeal was dismissed the trial court's determination that this action was properly removed became the law of the case. *Lehman Co. v. Appleton Toy & Furniture Co.* (7 Cir.), 148 F. (2d) 988. Thus the correctness of such finding or the denial by the court of appellants' motion to remand after final judgment may not be considered on this appeal. *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 Sup. Ct. 317. *Cf. Roberts v. Cooper,* 61 U.S. 467, 15 L. Ed. 969;[6] *United States v. Axman* (9 Cir.), 193 Fed. 644; *Bodkin v. Edwards* (9 Cir.), 265 Fed. 621; *Freeman v. Smith* (9 Cir.), 62 F. (2d) 291.

Statute of Limitations

Appellants include in their contentions and argue in their brief that the lower court erred in applying the Washington two-year statute of limitations to this action rather than the Washington three-year statute. This argument only confuses the real issue and is entitled to no consideration in this appeal. This was an issue upon which appellants intended to rely upon their former appeal (R. 32) but which has now become res judicata.

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[6]In the *Roberts* case the Supreme Court said:

"It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be heard or examined upon the second."

In spite of their contentions and arguments on the point, even appellants seem to concede that it is not in issue here (Br. 9).[7]

Dismissal of Former Appeal

Much of appellants' brief consists of a reargument of the matters presented to this Court on argument of appellees' motion to dismiss appellants' original appeal. Appellants neither expressly claim nor disavow the dismissal of their former appeal as a ground for their motion to vacate. Whether appellants' former appeal was timely cannot be an issue on this appeal since the matter has been decided by this Court and is now res judicata. Neither can appellants' failure through inadvertence or neglect to file their notice of appeal within the time required by law now be asserted as a ground for the relief requested. Such ground was not urged in the district court as a basis for the motion to vacate the original judgment and the judgment entered on mandate of this Court. As the affidavits filed in this Court in connection

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[7]There can be no doubt but that appellants failed to commence their action in time. Washington cases holding that actions such as this are controlled by the two and not the three-year statute of limitations are *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298; *Sterrett v. Northport Mining & Smelting Co.*, 30 Wash. 164, 70 Pac. 266; *White v. King County*, 103 Wash. 327, 174 Pac. 3; *Island Lime Co. v. Seattle* 122 Wash. 632, 211 Pac. 285; *Pettigrew v. McCoy-Loggie Timber Co.*, 138 Wash. 619, 245 Pac. 22; *Welch v. Seattle & Montana R. Co.*, 56 Wash. 97, 105 Pac. 166; *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 Pac. 442; *Weller v. Snoqualmie Falls Lumber Co.*, 155 Wash. 526, 285 Pac. 446; *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775; *Constable v. Duke*, 144 Wash. 263, 257 Pac. 637; *Noble v. Martin*, 191 Wash. 39, 70 P. (2d) 1064.

with the former appeal demonstrate, appellees might have proved in the district court, if appellants had raised such an issue, that appellants' failure to file their notice of appeal within the required time was due to their own negligence and not to any "laxity" on the part of the clerk.

From the foregoing it is clear that the only issue before this Court is whether the district court abused its discretion in denying appellants' motion to vacate the judgments. Appellees' argument, therefore, is confined to that issue.

ARGUMENT

Rule 60(b) of the Federal Rules of Civil Procedure sets forth the grounds upon which a court may set aside a final judgment. It provides:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. * * *"

It is established, and appellants concede (Br. 24), that a motion to vacate a judgment is addressed to the sound legal discretion of the trial court and that its determination will not be disturbed on appeal except for abuse of discretion. *Independence Lead Mines v. Kingsbury* (9 Cir.), 175 F. (2d) 983, cert. den. 338 U.S. 900, 70 Sup. Ct. 249.

Rule 60(b) reflects on its face that it was intended to afford relief only in unusual situations where the remedy by appeal is inadequate. Clearly it was not intended to permit or require the redetermination of an issue of fact already disposed of, without some proof of fraud or newly discovered evidence. Neither was it intended as an alternative to an appeal as a means of review. Otherwise specification of the situations in which relief may be granted under the Rule would be unnecessary and meaningless.

Appellants have made no attempt to show that a situation exists in which relief might be justified for any of the first five reasons enumerated in Rule 60(b). They attempt to stand upon the sixth ground: "any other

reason justifying relief from the operation of the judgment." But the Supreme Court has made clear that a court is not required or permitted to grant relief from a judgment on this ground except in the most "extraordinary circumstances." *Ackermann v. United States,* 340 U.S. 193, 71 Sup. Ct. 209. Appellants have not shown and the record does not disclose that there are any extraordinary circumstances here involved such as might justify the extraordinary relief which appellants seek. Certainly a possible error in the determination of a fact is not such a circumstance. See *Bronson v. Schulten,* 104 U.S. 410, where the Supreme Court said at page 416:

> "It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above mentioned, and in England, that it does not reach to facts submitted to a jury or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case."[8]

When moving for vacation of the judgments, appellants did not state any grounds or specify any reasons whatever for the relief they sought. Rule 7(b)(1) of the Federal Rules of Civil Procedure provides:

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[8]Throughout their brief appellants assume that there was a substantial issue before the court as to whether they had joined C. S. Thayer as a co-defendant with the fraudulent intent to defeat the jurisdiction of the United States court (Br. 3, 16, 19, 22). Actually in the affidavits which they filed appellants did not deny that the joinder was fraudulent, nor did they deny most of the facts which Aluminum Company of America showed in support of its allegation to that effect. When moving to vacate the judgments appellants did not offer any new evidence tending to prove that the joinder was made in good faith.

> "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor,* and shall set forth the relief or order sought * * *" (Italics supplied.)

Appellants' failure to comply with the rule was sufficient ground in itself for denial of their motion. *Steingut v. National City Bank of New York* (E.D.N.Y.), 36 F. Supp. 486. Certainly this Court cannot reverse the order of the district court when there is nothing in the record to show on what, if any, ground appellants urged their motion below.

Appellants now assert that the failure of the court to make findings of fact when denying their motion to remand (prior to entry of the original judgment) required vacation of the judgments. But findings of fact are not required on decisions of motions. *Magidson v. Duggan* (8 Cir.), 180 F. (2d) 473, 479, cert. denied 339 U. S. 965, 70 Sup. Ct. 1000.

Rule 52 of the Federal Rules of Civil Procedure provides:

> " * * * Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."[9]

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[9]The Advisory Committee on Rules state in their Notes:

"The last sentence of rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under rule 12 or rule 56, except as provided in amended rule 41(b). As so holding, see Thomas v. Peyser, App. D. C. 1941, 118 F. 2d 369; Schad v. Twentieth Century-Fox Corp., C.C.A. 3, 1943, 136 F. 2d 991; Prudential Ins. Co. of America v. Goldstein, N. Y. 1942, 43 F.

Rule 41(b) requires the court to make findings only in cases in which it renders judgment on the merits against the plaintiff. If a district court were required to make findings in connection with every motion on which it passed, whether it be a motion for discovery, a motion questioning the jurisdiction or venue of the court, a motion for leave to bring in additional parties, or a motion for any other of the many purposes for which motions may be made, the burden on the court would be intolerable. The language of Rule 52 is explicit and conforms with the expressed intention of the Committee on the Rules.[10] Thus it is completely clear that the court was not required to make findings of fact when denying appellants' motion to remand, and appellants must then, at least, have so supposed.

At no time did appellants request the court to make findings of fact when disposing of their motion to remand. Instead, appellants asked the court to restrain them from proceeding any further in the state court (R. 27). When attempting to appeal from the original judgment dismissing this action, appellants did not assert that they intended to rely upon any supposed error of the court in failing to make findings of fact (R. 32). Appellants did not state in their motion to vacate that the court had erred by failing to make findings of fact (R.

Supp. 767; Somers Coal Co. v. United States, Ohio 1942, 2 F. R. D. 532, 6 Fed. Rules Serv. 52a.1, Case 1; Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co., Ky. 1942, 2 F. R. D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed. Rules Serv. 936."

Note following Rule 52 in Title 28, U.S.C.A.

[10] *Ibid.*

52). So far as the record discloses, the contention that findings of fact should have been made is asserted for the first time on this second appeal.

A party is not entitled to assert on appeal an objection which he did not make below. Rule 46 of the Federal Rules of Civil Procedure provides:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

Since the appellants at no time made "known to the court the action which (they) desired the court to take," they would not be entitled to object to the failure of the court to make findings on this appeal even if findings were required.

In *Fowler v. Crown-Zellerbach Corp.,* 163 F. (2d) 773, appellants attacked in this Court the portion of a pretrial order which limited the issues. The record did not disclose whether in the district court appellants had objected to the order or had requested that it be amended or modified. This Court held that Rule 46 precluded appellants from objecting to the order on appeal.

In *Bucy v. Nevada Construction Co.,* 125 F. (2d) 213, the district court had remanded the case to the state court after it had been removed. Four days later, how-

ever, the court vacated its order and proceeded to final judgment without any objection or protest from plaintiff. On appeal to this Court plaintiff asserted for the first time that the district court did not have power to vacate its order of remand and proceed to trial. This Court held that Rule 46 precluded plaintiff from raising this objection for the first time on appeal.

Appellants no doubt refrained from asking Judge Leavy to make findings of fact, assuming what must be obvious: Such findings simply would have made explicit what was implicit in the order denying the remand, *i.e.,* that C. S. Thayer was improperly joined as a defendant. There was no substantial evidence to the contrary. Whether C. S. Thayer had been properly joined being the only issue, Judge Leavy's order denying the remand was tantamount to a finding that Thayer was not properly joined. *Rokey v. Day & Zimmermann, Inc.,* (8 Cir.) 157 F. (2d) 734, 738.

Rule 61 of the Federal Rules of Civil Procedure provides that nothing "omitted by the court * * * is ground * * * for vacating * * * a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Had the failure of the court to make findings of fact been asserted as a ground for appellants' motion to vacate the judgments, Rule 61 would have required the court to disregard such failure even if it thought findings were necessary. *Cornucopia*

Gold Mines v. Locken (9 Cir.), 150 F. (2d) 75, 78, cert. den. 326 U.S. 763, 66 Sup. Ct. 144. It was clear that Judge Leavy's ruling would have been the same even if he had made findings and that no substantial right of appellants was affected by his failure to do so.

From the foregoing it follows that the court was not privileged to vacate the judgments because no findings of fact were made when appellants' motion to remand was denied.

Appellants apparently have abandoned their position that the judgments should be vacated because of an error of law in denying their motion to remand (Br. 25). Clearly the remedy for the correction of an error of law, had there been such an error, would have been by appeal and not by application for vacation of judgment. *Lehman Co. of America v. Appleton Toy & Furniture Co.* (7 Cir.), 148 F. (2d) 988.

This case is similar in many respects to *Jackson v. Irving Trust Company,* 311 U. S. 494, 61 Sup. Ct. 326. Plaintiffs obtained a decree ordering the Alien Property Custodian to pay over to them a sum from the assets of a German corporation. Defendants did not appeal, but after the time for appeal had expired sought to have the decree set aside on the ground that the Court had been without jurisdiction to enter the decree. Defendants contended that the issue of jurisdiction had not been litigated. The Supreme Court, in a unanimous decision, held that it was error to vacate the decree. The Court said:

> "And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree. (Citing cases). If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken." (p. 330)

Certainly if a judgment or decree may not be vacated to permit the determination of an issue of fact which was not litigated, a judgment may not be set aside to make possible the redetermination of an issue which has already been fully considered by the court. Appellees submit that the court did not abuse its discretion in denying appellants' motion and that the order of the court must be affirmed.

Respectfully submitted,

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APPENDIX A

Erroneous Statements of Fact and Statements Not Supported by the Record Contained in Appellants' Brief

1. On page 5 appellants inadvertently state that "On December 6, 1950, the bond on said appeal was served upon defendants' attorneys."

The fact, as disclosed by counsel's affidavit, is that appellants' Portland counsel mailed a certified copy of the bond on appeal to appellees' Tacoma counsel on January 6, 1951 (R. 44).

2. On page 5 appellants say that E. E. Redmayne stated that the clerk's office had not been in the practice of removing mail from its box in the afternoon, and that if plaintiffs' notice of appeal had been delivered during the afternoon it would not have been opened by the clerk's office until the next day.

There is no competent evidence in the record to this effect. Miss Redmayne's affidavit, as well as the affidavits of Edgar Schofield and Inez V. Stedman, filed in this Court, show that generally, although not invariably, the clerk's postoffice is attended by someone of the clerk's personnel in the afternoon and that probably, if the letter enclosing the notice of appeal had been placed in the clerk's box during the afternoon, it would have been picked up and filed on the same day.

3. On page 6 appellants state that "the Clerk has admitted that if it (the notice of appeal) had been de-

livered in the afternoon of January 8, it would probably not have been stamped until the following morning." The clerk actually stated that "there is a possibility that the mail wasn't picked up in the afternoon" (R. 41). See also Brief, pages 25-26.

4. On page 25 appellants state that in the normal course of the mail their notice of appeal would have been delivered on Monday, January 8, 1951. The fact, as disclosed by the affidavit filed by appellants, is that in the normal course of the mail the notice of appeal would have been delivered on Sunday, January 7, 1951, and that if it had been so delivered, it would have been filed on January 8 (R. 43). That the notice of appeal was not delivered on January 7 demonstrates that it was not carried in the normal course of the mail. It is now impossible to tell whether the envelope containing the notice of appeal was misaddressed, mislaid, missorted, or misdelivered.

5. On pages 8 and 19 appellants state that when denying their motion to remand, the district court announced from the bench that it based its decision on the issue "that defendant Thayer was not liable to plaintiff." This statement is not supported by the record.

6. On pages 7, 22 and 24, appellants state that they pointed out to the district court in urging their motion for vacation of judgment that no findings of fact had been made by the court in determining the factual issue raised by their motion to remand, that findings of fact were necessary, and that it was therefore incumbent upon the court to determine the facts. These statements

are not supported by the record. So far as the record shows the first time that appellants have urged anywhere that the district court erred by failing to file findings of fact is on this appeal.

7. On pages 7 and 22, appellants say that Judge McLaughlin stated on denying their motion for vacation of judgment that he did not have authority to overrule the decision by a judge of co-ordinate jurisdiction. This statement is not supported by the record.

8. On page 9 appellants assume that the court received "erroneous impressions of fact" during the remand proceedings. Appellants have not shown, and there is nothing in the record to indicate, that the court received any erroneous impression of fact.